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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 868.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL.,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellees.

No. 886.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants,
vs.
STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL.,
Appellees.

Appeals From the District Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLANTS IN NO. 868 IN REPLY TO BRIEF FOR RAILROAD APPELLEES.

This brief replies only to the brief for the railroad appellees. It is intended primarily to correct misstatements contained in that brief and does not deal generally with the questions involved on this appeal. With respect to those we rely on our original brief.

I.

The distance scale used by the Ohio Commission in fixing the rates from the Ohio No. 8 field to Canton and Massillon

and by the Wheeling in extending these rate reductions to Akron, Cleveland, Lorain and Huron, was devised by the Interstate Commerce Commission to establish the rates from Indiana mines to destinations in eastern central Illinois. *Coal Trade Assn. v. Baltimore & O. R. Co.*, 185 I. C. C. 225. That case extended a scale previously used by the Commission in fixing intrastate rates in Illinois in a thirteenth section proceeding. *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537; 183 I. C. C. 751.

In our principal brief, we asserted that this Indiana-Illinois scale had been used by the Commission to prescribe maximum reasonable rates in those cases. In the brief of the railroad appellees here (p. 17), our assertion as to the character of the rates imposed by the Commission in the Indiana-Illinois cases is challenged. We adhere to our original statement.

In *Coal Trade Assn. v. Baltimore & O. R. Co.*, 185 I. C. C. 225, the scale appears in the form used by the Ohio Commission and the Wheeling in making the Ohio reductions above referred to. The Commission's finding in that case (p. 231) was "that the rates assailed were not *but that they are and for the future will be unreasonable to the extent that they exceed or may exceed* the following rates for the distances stated." (Emphasis ours.)

Coal Trade Assn. v. Baltimore & O. R. Co., was reheard by Division 4 (190 I. C. C. 743) because it was found that the method of determining the distances to which the scale applied, which had been prescribed in the thirteenth section case, 182 I. C. C. 537, and in the original report in the *Coal Trade Association case*, was inappropriate in the latter. Accordingly, a method of determining distances was prescribed which in many instances resulted in somewhat shorter distances than the method originally provided. To compensate for this reduction of distances this scale was revised to provide somewhat higher rates. The Commission said (p. 745):

"The evidence of record indicates that this will result in rates somewhat lower than would be the case if the distances were computed as required by the decision in the Illinois case. It follows, therefore, that the distance scale of rates hereinafter prescribed should be somewhat higher than that approved in our former report."

The report then takes up the question of reparation and in the discussion of that subject, the language relied on by the railroad appellees and quoted on page 17 of their brief here was used. In order that it may be read in its context, we quote a longer passage of the report, italicizing the language quoted by our adversaries (190 I. C. C., at pages 745-746):

"In our original report we dismissed the complaints as to reparation on the ground that the rates assailed were among those found justified in *Indiana and Illinois Coal*, 40 I. C. C. 603, and cited the *Arizona Grocery Co. case*. Complainants urge that our finding on that point was in error and that we should have followed the *Eagle Cotton Oil Co. case*, 51 Fed. (2d) 443. Upon further consideration of the record, we conclude that neither of the court cases is controlling here. In general, the adjustment here in question has been maintained on the basis which we approved in 1916 without change except for the subsequent general increases and reductions. Parts of this general adjustment have been before us since 1916 and the relation of certain of the rates has been changed but the principle of grouping has been maintained. Under the circumstances, defendants were justified in assuming that they were maintaining reasonable rates. In *Eastern Live Stock Cases of 1926*, 144 I. C. C. 731, 781, we said:

When we are of the opinion that rates have become unreasonable as the result of changes in conditions so gradual that no date can be pointed out upon which they became unreasonble, and the history of the rates is such as to justify the carriers in believing that they were maintaining rates which had our approval, we have the power to fix the reason-

able rates for the future and, in that 'flexible limit of judgment which belongs to the power to fix rates,' to refuse to hold the rates unreasonable in the past.

That principle is applicable here, where none of the assailed rates appear extortionate, where *our findings for the future are primarily to more properly align these rates with the rates from competing mines rather than the fixing of maximum reasonable rates for the services rendered,* and where a present condemnation of the rates for the past would be equivalent to penalizing defendants in the way of damages for doing what we had previously told them they might do.

Upon further consideration we find that the rates assailed were not unreasonable, but that they are, and for the future will be, unreasonable to the extent that they exceed or may exceed the following distance scale of rates:"

This decision was announced after the Ohio Commission had fixed or authorized the rates here in question and while the thirteenth section proceeding, out of which this case arose, was pending before the Commission.

It is submitted that the passage quoted by our adversaries relates wholly to the *purpose* of the Commission in fixing the rates and not to the *character* of the rates fixed. Further it does not say that the fixing of maximum reasonable rates was no part of the purpose of the Commission. Turning from what the Commission said about its intention to what it did, we invite attention to the concluding paragraph of the passage quoted in which it finds that the rates in question *are and for the future will be unreasonable to the extent that they exceed or may exceed* the following distance scale of rates. In Mr. Commissioner Eastman's language (R. 66), these rates were prescribed "in terms as maximum reasonable rates which could not be exceeded."

This view as to the character of the Indiana-Illinois rates is explicitly confirmed by the first report in the Illinois thirteenth section case. The Commission there referred to the level of rates theretofore fixed by it in Indiana-Illi-

nois territory as "the reasonable maximum level of rates for this territory determined by us." (182 I. C. C., at page 545.) The scale prescribed in that case and later extended in the *Coal Trade Association case* "was based upon the general level of the interstate rates, many of which we had prescribed, now in effect in the same general territory." *Intrastate Rates on Bituminous Coal in Illinois*, 188 I. C. C. 342, 344.

II.

On page 18 of their brief the railroad appellees charge us with "numerous misstatements" in our principal brief. We have re-examined the statements referred to in the light of counsels' criticisms. We adhere to those statements as made, and we submit the following references to the record in support of them.

On page 18 counsel attribute to us and characterize as a misstatement the alleged assertion "that Docket No. 23130 involved rates between points in central eastern Illinois." We did not make this statement. We said (page 12 of our original brief) that the reductions in the Ohio rates first prescribed by the Ohio Commission and then voluntarily extended by The Wheeling and Lake Erie Railway Company

> "were arrived at by the application of a mileage scale prescribed by the Interstate Commerce Commission in its Docket Nos. 23130 and 23922 as a basis for fixing maximum reasonable rates on coal between points in central eastern Illinois and from points in southwestern Indiana to the same destinations".

This statement is accurate. It is supported by I. C. C. Exhibit 143 (Vol. III, Exhibits before I. C. C., page 27), which is a map showing the territory in which the scale referred to applies, and by Appendix A to the first report in *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C., at page 566, which is a statement showing the points of origin and destination embraced in cases before the Illi-

nois Commerce Commission, the rates between which were in issue in that case.

Counsel next characterize as a misstatement, on page 18 of their brief, the statement on page 12 of our principal brief "that Docket No. 23922 involved a large movement of coal". We did not make this statement with respect to No. 23922 alone but with respect to both cases, Nos. 23130 and 23922. We adhere to that statement, and in support of it refer to the Commission's findings in No. 23130 and to the evidence in the case at bar before the Commission. In No. 23130 the Commission said, referring to a number of named destinations in the scale territory shown on Exhibit 143 (182 I. C. C., at page 551):

> "There is a substantial movement of coal from Illinois mines to these and all other destinations shown in Appendix C."

The Commission also said in the same report, referring *inter alia* to Decatur and Champaign, Illinois, which are in the territory where the scale was prescribed (182 I. C. C. at page 546):

> "A very substantial volume of coal moves from Illinois mines to these destinations, in keen competition with Indiana and western Kentucky mines producing substantially the same quality of coal."

Referring to the same question, the following testimony was given in the present proceeding before the Commission (R. 1169):

> "There is a substantial movement into Paris, Ill., from the Brazil-Clinton group and a heavier volume from the Linton-Sullivan group. Brewer, Ill., shown on page 1, is the point at which the Danville switching yards of the C. & E. I. are located, and there is a substantial movement of coal (1623-5) delivered at that point.
>
> There is a substantial movement of coal to Hoopeston, Ill., from the Brazil-Clinton group, a heavy move-

ment of coal (fol. 1842) to Champaign, Ill., and Urbana, Ill., from the Brazil-Clinton group, a substantial movement of coal from the Princeton group to Paris, Ill., also to Champaign and Urbana, Ill., a substantial movement of coal to Hoopeston, Ill., from the Princeton group. * * *"

Counsel next characterize as a misstatement, on page 18 of their brief, the assertion, which they attribute to us, that the interested parties prepared voluminous evidence in No. 23922. What we actually said on page 12 of our principal brief, was that because of the fact that Nos. 23130 and 23922 involved the rates on a very large movement of coal "the interested parties prepared voluminous evidence as to the propriety of the rates," citing the first report in No. 23130. An examination of that report, which covers 29 pages of text and seven pages of appendices, will fully substantiate our statement that "the interested parties prepared voluminous evidence as to the propriety of the rates" in that proceeding. After the level of the rates had been determined in that proceeding, it was conceded by the carriers in No. 23922 that the same level should be applied from Indiana into Illinois (185 I. C. C., at page 230). Thus, the scale prescribed in the two cases was the outcome of the voluminous evidence received in the first case.

Counsel next refer, on page 18 of their brief, to the statement appearing on page 13 of our principal brief, that the Pennsylvania, the New York Central and the Baltimore and Ohio haul coal in both Ohio and in Indiana-Illinois scale territory, and characterize this statement as an erroneous implication "that the three large Ohio railroad systems handle any appreciable tonnage of coal in central eastern Illinois or from points in southwestern Indiana to the same destinations". We did not make the statement imputed to us by counsel that the railroads referred to handle an appreciable tonnage of coal in central eastern Illinois or from points in southwestern Indiana to the same destinations.

The fact is, however, that those railroads do handle substantial tonnages of coal in that territory. I. C. C. Exhibit 143, already referred to, shows that the lines of the railroads referred to traverse Indiana-Illinois scale territory extensively and serve some or all of the originating districts in Indiana. The New York Central and Pennsylvania run from the Brazil-Clinton district to Paris, where the evidence shows there is a substantial movement (R. 1169). The New York Central runs from the Linton-Sullivan district to Paris, where the evidence shows there is a heavy movement (R. 1169). The New York Central Railroad participates in routes from the Brazil-Clinton district to Hoopeston, and runs from the Brazil-Clinton district to Champaign and Urbana. The evidence shows that there is a substantial movement from the Brazil-Clinton district to Hoopeston and a heavy movement to Champaign and Urbana (R. 1169). The New York Central runs from the Princeton district to Paris, Champaign and Urbana, where the evidence shows there is a substantial movement, and participates in the route from the Princeton district to Hoopeston where there is likewise a substantial movement (R. 1169).

Counsel next, on page 18 of their brief, characterize as erroneous the implication "that the carriers' witnesses admitted that rates in Ohio should be pulled down to the level of the Illinois-Indiana rates referred to because the latter were on a lower basis." This is a perversion of our statement. We actually said (original brief, page 14):

> "Their expert witnesses admitted on cross-examination that they knew of no transportation reason why the rates in the two sections should be on different levels".

The testimony of those witnesses was as follows:

S. C. Matthews testified (R. 1548):

> "As to there being any reason why rates on coal in Illinois or between Indiana and Illinois should be on a

lower level than the rates between points in Ohio, as I have stated, the Illinois rates, I think, even in 23922 were too low. If they were upon a normal level there might not be any reason why the rates in Ohio should be higher than they are in that territory, unless there are certain conditions of which I know nothing."

H. A. Cochran testified (R. 1566):

"I heard Mr. Matthews' testimony with regard to rates in Illinois, Indiana and Ohio. Just stated the other way, I would agree with what he said. He said he didn't know any reason, I believe, why the Ohio rates should be higher than the Illinois rates if the Illinois rates were on the proper level. I don't believe the Illinois rates are on the proper level."

After having made the wholly unjustified charges of misrepresentation just referred to, counsel say that "an examination of the record will disclose that appellants' statements in these particulars are wholly unfounded." They then attempt to prove by references to the record the opposite of the assertions which they erroneously attributed to us. As we have shown what we in fact asserted, and have fully supported all of our assertions, it is unnecessary to consider whether or not the contrary of assertions which we did not make are or are not true.

III.

Counsel, at page 24 of their brief, refer to the statement on page 18 of our original brief to the effect that the Commission's principal criticism of the Wheeling cost study involved a gross mathematical error which has neither been repudiated nor defended, and say that the Commission's criticisms of this study were fully supported in a verified statement filed with the Commission after the hearing by appellees. This verified statement does not purport to support the recalculation made by the Commission which

constituted its principal criticism. That criticism is explained and met, and the Commission's recalculation shown to be erroneous, at pages 17 to 19 of our original brief and in Appendix B thereto, and our showing in this regard stands uncontradicted.

IV.

On page 25 of their brief the railroad appellees cite and quote from a decision of the United States District Court for the Southern District of New York, *Railway Express Agency, Inc. v. United States*, decided March 7, 1934. At this writing we have not seen the opinion. It apparently, however, relates to a study designed to show the actual cost of carrying a particular commodity by express "when that commodity was but one of thousands of different kinds of commodities carried by the railroads". This criticism would seem to have little bearing upon the cost study in our case which related to coal carried always in carload lots and, as the evidence shows, largely in trains consisting almost entirely of that commodity.

V.

At page 37 of their brief, counsel say that "it would be an unnecessary trespass upon the time of this Court to answer separately each and every misleading statement set forth in appellants' brief and none of which find support in the record." They then call attention to the reference to the *Empire Steel Case** at page 37 of our principal brief as typical and say that "the paragraph referred to is not only misleading but is entirely inaccurate." From the discussion which follows, it is apparent that counsel confused what we said on the page of our brief referred to with regard to the rates from Ohio No. 8 to Canton, Massillon and Akron with what we said on the same page concerning the Cambridge-Mansfield rate. With respect to the former

*Empire Steel Corp. v. B. & O. R. R. Co., P. U. C. of Ohio, No. 7036.

rates, we said that they never had any traditional relation to the rates from the Pittsburgh or other interstate districts. We did not make this statement with regard to the Cambridge-Mansfield rate. That the rates from Ohio No. 8 to Canton, Massillon and Akron have no differential relationship to the interstate rates was conceded by the carriers' witness (R. 571-572, 573).

Our statement with regard to the Cambridge-Mansfield rate was that it was fixed by the Public Utilities Commission of Ohio in the *Empire Steel Case;* that the purpose and effect of that decision was simply to remedy a local discrepancy in the Ohio adjustment; and that it conformed the Cambridge-Mansfield rate to other intrastate rates that were not reduced and were not in issue before the Interstate Commerce Commission in the case at bar. This statement is accurate. (I. C. C. Ex. 7; Vol. I, Exhibits before I. C. C., pp. 46-60.) The passage in our principal brief is perfectly clear, and we accept no responsibility for our opponents' confusion on the subject.

In the same passage, counsel for the railroad appellees say that "the purpose and effect of the order of the Ohio Commission (in the *Empire Case*) was not 'to remedy a local situation' but was entirely arbitrary and knowingly a departure from the agreed adjustment." This seems to mean that counsel claim that at some time the Ohio Commission had agreed that it would not thereafter reduce the Cambridge-Mansfield rate. Counsel are referring to the testimony of their witness Kern (R. 574-575) to the effect that he understood that his principals believed that certain relationships between interstate and intrastate rates, including the Cambridge-Mansfield rate, which resulted from the Ohio Commission's compliance in 1923 with the finding of the Commission, unsupported by an order in the *Ohio-Michigan Coal Cases** "were thereby permanently established and that they would encounter no further difficulty in connection therewith." That is to say that the witness be-

*80 I. C. C. 663.

lieved, as apparently his counsel do, that the Ohio Commission could and did in 1923 bind itself by covenant that it would not in 1932 exercise its lawful function to regulate intrastate rates in Ohio.

We submit that the time of this Court should not be taken up with such contentions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this brief upon counsel for all adverse parties by mailing the same properly addressed, postage prepaid.

Dated at Washington, D. C., this 5th day of May, 1934.

ERNEST S. BALLARD,
Of Counsel.